

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

A. TEICHERT & SON INC.
dba TEICHERT CONSTRUCTION
3500 American River Drive
Sacramento, CA 95864

Employer

Dockets 09-R4D5-0459 and 0460

**DECISION AFTER
RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having taken this matter under submission, renders the following decision after reconsideration.

JURISDICTION

Beginning on October 2, 2008, the Division of Occupational Safety and Health (Division) commenced an accident inspection at a place of employment in California maintained by A. Teichert & Son Inc., dba Teichert Construction (Teichert or Employer). On February 2, 2009, the Division issued 2 citations to Employer. Citation 1 alleged a Serious Willful violation of California Code of Regulations, Title 8, section 1541(b)(3) [failure to determine location of underground utility by safe and acceptable means] and proposed a civil penalty of \$70,000.^{1,2} Citation 2 alleged a Serious Willful violation of section 1541(k)(2) [failure to remove exposed employees from danger area], and proposed a civil penalty of \$70,000.

Employer filed timely appeals of both citations.

Administrative proceedings were held, including an evidentiary hearing before an Administrative Law Judge (ALJ) of the Board. After taking testimony and considering the evidence and arguments of counsel, the ALJ issued a

¹ Unless otherwise specified, all references are to California Code of Regulations, Title 8.

² Citations may be classified as "regulatory," "general," or "serious." In addition a violation may be alleged to be a "repeat" and/or "willful." When one or both of the latter circumstances pertains, the classification of the violation may be alleged, as here, to be "serious willful." Each element presents a separate question, i.e. was the alleged violation "serious," and was it "willful." The violation may be found to be one or the other or both or neither.

Decision on December 15, 2011. The Decision sustained the citations and held the violations to be Serious, but declined to find them to be Willful as well.

The Board on its own motion issued an Order of Reconsideration on January 13, 2012 to determine whether the Division had proved the violations to be Serious Willful. Subsequently, the Division filed a petition for reconsideration, which the Board took under submission by order of February 23, 2012.

Employer filed a Response to the Board's Order of Reconsideration and an Answer to the Division's petition.

ISSUE

Did the evidence prove the violations to be Willful as well as Serious?

EVIDENCE

The summary and discussion of the evidence in the Decision are incorporated here by reference. For clarity, we briefly restate the evidence.

Employer entered into a contract with the City of Paso Robles to install a new underground water line. The project included trenching in city streets to lay pipe for the new line.

On the evening of October 2, 2008, three Teichert employees were working in the trench at the intersection of Niblick Road and South River Road. Two of them were inside a large pipe removing wooden supports called "stulls," while the third was outside the pipe taking the pieces of wood from the other two. Another Teichert employee was operating a large motorized vehicle called an "excavator" in the vicinity of the three men in the trench. The excavator hit and ruptured an 8-inch water line, releasing water which flooded the trench. The two employees in the pipe drowned; the third employee in the trench was rescued.

About two weeks prior to the fatal accident, Hank Duggins, one of Employer's foremen who was the supervisor in charge of the job the night of the accident, and Aaron Borden, a representative of the City's Water Department, walked through (i.e. inspected) the Niblick/South River Road intersection in anticipation of the work. Borden pointed out that the path of Teichert's excavation would be in proximity to two existing water lines at that intersection, and would "conflict" with – i.e. intersect the path of – at least one of them, an 8-inch water line. Borden also showed Duggins a map indicating the conflicts between the excavation and existing underground utilities, including the one broken in the accident. Duggins had a copy or a version of the map.

There was also testimony that the path of the existing water lines was not marked on the road surface although it was the City's usual practice to mark their path on the street surface.

Shortly before the accident on the evening of October 2, 2008, a representative of the engineering firm working on the project, Steve Arington, stopped the excavation work and used a project map to show Duggins and Tony Conte, another Teichert foreman, that the excavation was approaching a water line.³ Duggins went to his car to check another map called a "lay map," which depicted the pipe laying plan. Duggins then instructed the operator of the excavator to start up again. The accident occurred shortly thereafter.

Borden testified that when he arrived at the scene about 15 minutes after the accident, Duggins asked him why he, Borden, had not told Duggins about the water line. Borden replied that he already had, both with the map and during the "walk-through" of the Niblick/South River Road intersection. Duggins then stated that he had been reading the map upside down when he checked it after the three-way discussion with Arington and Conte.

The evidence in the record establishes that Employer, through its foreman Duggins, had been informed of the presence of the two existing water lines under the Niblick/South River Road intersection, had been told that the trench excavation would conflict with the 8-inch water line, and was given a map or maps showing the conflict. Nonetheless, Duggins ordered the excavation to proceed, even after being reminded of the presence of the water line shortly before the accident.

FINDINGS AND REASON FOR DECISION AFTER RECONSIDERATION

In making this decision, the Board relies upon its independent review of the entire evidentiary record in the proceeding. The Board has taken no new evidence. The Board has also reviewed and considered the briefs and arguments of the parties.

The Division has the burden of proving each element of an alleged violation, including the violation's classification, by a preponderance of the evidence. (*Trio Metal*, Cal/OSHA App. 03-0317, Decision After Reconsideration (Feb. 2, 2009) citing *Control Air Conditioning Corp.*, Cal/OSHA App. 05-1627, Denial of Petition for Reconsideration (Dec. 28, 2007).)

In her Decision as to Citation 1, the ALJ held that the evidence "demonstrates that two weeks prior to the accident [Duggins] knew about the waterline under the intersection. It is indisputable that Employer did not pothole or take other safety measures to locate the water line in the

³ The Decision's summary of the testimony also indicates that Conte was the individual who ordered the excavator to stop. For present purposes it does not matter whether Arington or Conte did so.

intersection[.]”⁴ (Decision, p. 9.) The Decision, however, stated, “While it may be said that Employer’s conduct technically met the standard for [a willful violation],” the ALJ chose not to uphold that classification. (Decision, p. 11.) Similarly, the ALJ sustained the Serious violation alleged in Citation 2, but was “unwilling” to sustain the Willful classification. (Decision, p. 14.)

We disagree with the ALJ’s conclusions in this regard and for reasons set forth below reverse the Decision as to the Willful classification of both Citations.

Section 334(e) defines a willful violation as “a violation where evidence shows that the employer committed an intentional and knowing, as contrasted with inadvertent, violation, and the employer is conscious of the fact that what he is doing constitutes a violation of a safety law; or, even though the employer was not consciously violating a safety law, he was aware that an unsafe or hazardous condition existed and made no reasonable effort to eliminate the condition.”

Section 334(e) establishes two alternate tests for determining whether a violation is willful. (*Rick’s Electric, Inc. v. California Occupational Safety and Health Appeals Bd.* (2000) 80 Cal.App.4th 1023, 1034. (*Rick’s Electric*.) Under the first alternative the Division must show the employer committed an intentional and knowing, rather than inadvertent, violation and is conscious that his behavior constitutes a violation of a safety law. (*Id.*) Under the second alternative the Division is required to prove the employer even though not consciously violating a safety law, was aware of the unsafe or hazardous condition and made no reasonable effort to eliminate the condition. (*Id.*) We find that the alleged violations were willful under both tests.

First Alternative Test

Whether an act was “intentional and knowing rather than inadvertent” under the first alternative depends on whether the “preponderance of the evidence [shows] that the employer committed a voluntary and volitional, as opposed to inadvertent, act, or, in other words, that the act itself was the desired consequence of the actor’s intent, and that the employer was conscious that its act violated a safety order.” (*Rick’s Electric, supra*, 80 Cal.App.4th p. 1037.)

Under this definition of “intentional and knowing,” the evidence shows the violations were willful. Duggins’ acts were “voluntary and volitional as opposed to inadvertent.” Duggins intended to and ordered the excavation to continue, so the excavation was an act which “itself was the desired consequence of the actor’s intent[.]” (*Rick’s Electric, supra*, 80 Cal.App.4th p. 1037.)

⁴ To “pothole” means to make a small excavation, usually by hand tools, to determine the location of underground utilities before the main excavation takes place.

Duggins had at least constructive knowledge that continuing the excavation was a violation of law. Duggins was the supervisor in charge of Employer's operation on the evening the accident occurred.⁵ He was Employer's "competent person" (Decision, p. 3) on the site, defined in section 1504 as, "One who is capable of identifying existing and predictable hazards in the surroundings or working conditions which are unsanitary, hazardous, or dangerous to employees, and who has authorization to take prompt corrective measures to eliminate them."⁶ As Employer's competent person on site, Duggins was charged with identifying hazardous conditions at the worksite, and with knowledge of applicable law, including section 1541 and Government Code section 4216.4.⁷ Thus he was also aware that continuing the excavation despite the conflict with the water line was an act in violation of a safety order. (See *Rick's Electric, supra*, 80 Cal.App.4th p. 1037.) As to Citation 1, Duggins is charged with knowledge that the excavation had reached the approximate location of the 8-inch water line and that he had failed to determine the line's "exact location . . . by safe and acceptable means that will prevent damage to the [water line]." (Section 1541(b)(3).) As to Citation 2, Duggins also knew that three of his supervisees were in the trench when he ordered the excavation to continue, and thus failed to remove them from the area of the hazard until appropriate steps were taken. (See section 1541(k)(2).) Accordingly, we hold that the first alternative test of "willful" was satisfied and sustain both the serious and the willful elements of the violations' classification. Duggins had personal knowledge of the excavation's conflict with the water line from his inspection of the Niblick/South River Road intersection with Borden about two weeks prior to the accident, and he was reminded of that conflict shortly before the accident when the work was stopped by Arington or Conte.

Second Alternative Test

"Under section 334's second test, [an employer] commits a willful violation when it is aware of a hazardous condition but fails to make

⁵ The knowledge of a supervisor is imputed to the employer. (*Hollander Home Fashions*, Cal/OSHA App. 10-3706, Denial of Petition for Reconsideration (Jan. 13, 2012).) When a supervisor violates a safety order, his knowledge of the violation is imputed to the employer. (*Sign Designs, Inc.*, Cal/OSHA App. 08-4686, Denial of Petition for Reconsideration (Feb. 23, 2012).) Such knowledge may be constructive as well as actual. (*Capital Building Maintenance Services, Inc.*, Cal/OSHA App. 97-680, Decision After Reconsideration (Aug. 20, 2001).)

⁶ Section 1504 sets forth definitions applicable to the "Construction Safety Orders," of which section 1541 is a part.

⁷ Government Code section 4216.4(a) states, in relevant part, "[w]hen the excavation is within the approximate location of subsurface installation, the excavator shall determine the exact location of subsurface installations in conflict with the excavation by excavating with hand tools within the area of the approximate location of subsurface installations as provided by the operators in accordance with Section 4216.3 before using any power-operated or power-driven excavating or boring equipment within the approximate location of the subsurface installation, except that power-operated or power-driven excavating or boring equipment may be used for the removal of any existing pavement if there are no subsurface installations contained in the pavement."

reasonable efforts to remove the condition.” (*Rick’s Electric, supra*, 80 Cal.App.4th p. 1039.)

There is substantial evidence in the record that Duggins knew of the hazardous condition, namely that the excavation in progress would intersect the location of the 8-inch water line. He gained that knowledge from the walk-through inspection with Borden, from the discussion about the water line with Arlington and Conte shortly before the accident, and from the maps of the existing lines and the planned course of the excavation which he had in his possession.

In spite of that knowledge, he ordered the excavation to continue without determining the line’s exact location by safe and acceptable means (§ 1541(b)(3), Citation 1); and without ordering the three Teichert employees in the trench to get out before the line’s location was properly determined. (§ 1541(k)(2), Citation 2.) Duggins could have had the 8-inch water line’s exact location determined by hand tools, and at a minimum could have ordered the three men in the trench to get out before continuing the excavation. He failed to do either. He therefore directed the work to continue “without taking any action to eliminate the hazardous condition presented.” (*Rick’s Electric, supra*, 80 Cal.App.4th p. 1039.)

The evidence thus establishes that both violations were willful under the second alternative test. Accordingly we reverse the Decision in part, and hold that Employer willfully violated section 1541(b)(3) and section 1541(k)(2).

Penalty for the Violations

Board precedent holds that while the Division may issue multiple citations to an employer for a single hazard, it is proper to assess only one penalty where a single means of abatement is needed to address the hazard. (*Sherwood Mechanical, Inc.*, Cal/OSHA App. 08-4692, Decision After Reconsideration (Jun. 28, 2012) citing *A & C Landscaping, Inc.*, Cal/OSHA App. 04-4795, Decision After Reconsideration (Jun. 24, 2010); *Strong Tie Structures*, Cal/OSHA App. 75-856, Decision After Reconsideration (Sep. 16, 1976).)

The 8-inch water line posed a single hazard to employees, namely that it could unexpectedly inundate the trench if not properly located before the excavation continued. Section 1541(b)(3) and section 1541(k)(2) (in pertinent part)⁸ both address that hazard but in different ways. Section 1541(b)(3) addresses the hazard by requiring locating underground installations such as the water line before excavating. Section 1541(k)(2), as applicable here, requires a “competent person who finds evidence of a situation that could result in . . . other hazardous conditions” to remove exposed employees “from

⁸ § 1541(k)(2) is quoted in full above.

the hazardous area until necessary precautions have been taken to ensure their safety.” The necessary precaution was, again, determining the exact location of the water line by safe and acceptable means before excavating the remainder of the trench. Had Employer done so, we assume it would then have continued the excavation in a manner which would not damage the water line.⁹

In view of the availability of a single means of abatement of the hazards addressed by each of the two citations, we impose only a single \$70,000 civil penalty for the two violations.

DECISION

The Decision of the ALJ is reversed in part and affirmed in part. We hold that Employer committed a Willful violation of section 1541(b)(3) (Citation 1, docket number 09-R4D5-0459) and of section 1541(k)(2) (Citation 2, docket number 09-R4D5-0460). The Decision is affirmed as to its holding that the two violations were Serious. A civil penalty of \$70,000 is hereby assessed against Employer.

ART R. CARTER, Chairman
ED LOWRY, Board Member
JUDITH S. FREYMAN, Board Member

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⁹ In this situation, the hazard to employees could have been abated by having the three men in the trench come out until excavation in the proximity of the water line was finished. Had that been done, they would have been out of the zone of danger even if the pipeline was broken during the excavation. Removing the men from the trench would not abate the hazard in all situations however, since if the pipeline were one containing natural gas, say, rather than water, the operator of the excavator would be exposed to the hazard of fire and/or explosion even if no workers were in the trench. The better means of abatement, therefore, appears to us to be to locate the underground installation by safe and acceptable means which will prevent damage to it.